**Monterey Newspapers, Inc., a wholly owned subsidiary of Knight-Ridder, Inc. *and* The San Jose Newspaper Guild Local 98, chartered by The Newspaper Guild, AFL–CIO, CLC.** Case 32–CA–16323

August 9, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On September 30, 1998, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, the The General Counsel and the Union each filed an answering brief, and the Respondent filed reply briefs to both answering briefs. Additionally, the General Counsel and the Union each filed limited exceptions and a supporting brief, and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify the Union and provide it with an opportunity to bargain concerning the rates of pay to be offered applicants for employment. We reverse the judge and dismiss the complaint.[1]

The Respondent acquired Monterey Newspapers, Inc. (MNI), publisher of the *Monterey County Herald* newspaper, from E. W. Scripps on August 24, 1997. During Scripps' ownership of MNI, MNI's employees were represented by the Union and, at the time of the purchase, were covered by a collective-bargaining agreement effective through June 30, 1999. The Respondent hired a vast majority of the unit employees and continued publishing the *Herald* without interruption. On August 28, 1997, the Respondent recognized the Union as the exclusive bargaining representative of employees in "an appropriate unit." The judge found that the Respondent was a successor employer obligated to recognize the Union as the exclusive bargaining representative of the employees in the historical unit described in the collective-bargaining agreement.[2] There are no exceptions to this finding.

Prior to acquiring MNI, the Respondent established, as part of its initial terms and conditions of employment, a separate pay system applicable to new employees hired after its acquisition of MNI. Under this system, the Respondent created a pay band for each job classification. The pay bands were for use in determining wage rates offered to job applicants. Thus, the Respondent would offer a job applicant a starting wage rate within the pay band for the particular job classification for which the applicant was to be hired. The Respondent would decide on the specific rate within the pay band based on the applicant's qualifications and the local market conditions for such jobs. The Respondent might raise its initial offer but would keep the offer within the pay band for the job classification.

This new pay system was applicable only to new employees hired after the Respondent's acquisition of MNI. The former Scripps employees whom the Respondent retained were paid the same pay rates that they had previously earned, which had been determined under the Union's collective-bargaining agreement with Scripps.

The judge found that the Respondent lawfully established its pay system for new hires as part and parcel of its initial terms and conditions of employment under the *Burns*[3] doctrine. In *Burns*, the Supreme Court held that "a successor employer is ordinarily free to set initial terms on which it will hire employees of a predecessor."[4] The judge, nevertheless, found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with prior notice and an opportunity to bargain concerning the rate of pay it proposed in each job offer it made to each prospective new employee.

In finding this violation, the judge reasoned that the Respondent had effectively created a dual-compensation system, i.e., one compensation system for former Scripps employees and a separate compensation system for new hires, and that all aspects of the dual compensation system directly and vitally affected the unit employees. The judge explained that a specific pay offer to an applicant occurred immediately before the applicant's transition to unit employee status, that the pay rate an applicant was offered was derived from the pay bands, a mandatory subject of bargaining, and that hiring employees at rates different from those paid comparable former Scripps employees was likely to create employee unrest and make contract negotiations more lengthy and difficult. Additionally, the judge agreed with the General Coun-

[1] The judge also dismissed a complaint allegation concerning the Respondent's failure to pay overtime to certain employees. No exceptions were filed regarding the judge's disposition of this allegation.

[2] When a new employer acquires a business, makes no change in its essential nature, and a majority of its employees worked previously for the predecessor, the new employer has a duty to recognize and bargain with the union that represented its predecessor's employees. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 36–41 (1987); *NLRB v. Burns Security Services,* 406 U.S. 272, 278–281 (1972).

[3] *NLRB v. Burns Security Services*, supra.

[4] Id. at 294.

sel's argument that the discretion exercised by the Respondent's local managers in determining applicant pay rates was analogous to decisions frequently made in merit pay situations.

We find that the judge's analysis fails to accord the Respondent its proper rights as a lawful *Burns* successor. While the Court in *Burns* agreed with the Board that a successor employer was obligated to recognize and bargain with the union that had represented the predecessor's employees, the Court found that the successor was not bound by its predecessor's collective-bargaining agreement with the union. The Court explained:

> Holding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and the nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. . . . The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities.[5]

The Court also made clear that, in setting initial terms and conditions of employment that differed from those maintained by the predecessor employer under its collective-bargaining agreement, the successor was not making an unlawful unilateral change in conditions of employment. The Court stated:

> It is difficult to understand how [the successor] could be said to have changed unilaterally any pre-existing terms or conditions of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and . . . no outstanding terms and conditions of employment from which a change could be inferred.[6]

The court thus found that "a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor."[7]

In finding a violation in the present case, the judge relied heavily on his finding that the wage rates that the Respondent offered to applicants "vitally affected" current unit employees. We agree with the judge that the wage rates that job applicants were offered (and, thus, that newly hired employees were paid) are mandatory subjects of bargaining. That finding, however, is not sufficient to support the judge's conclusion that the Respondent's failure to provide the Union with notice and an opportunity to bargain concerning the rates of pay to be offered job applicants under the Respondent's new pay system violated Section 8(a)(5) and (1) of the Act. Indeed, as noted above, the Supreme Court held in *Burns* that a successor employer, such as the Respondent, is ordinarily free to set initial terms on mandatory subjects of bargaining, including such subjects as wages. Thus, the fact that wage rates to be offered job applicants were mandatory subjects of bargaining does not take them outside of *Burns*.

Additionally, contrary to the judge's apparent reasoning, the Respondent did not incur a bargaining obligation merely because, by establishing a new pay system for new employees, the Respondent created what could be characterized as a dual compensation system.[8] Dual compensation systems are not excepted from the *Burns* rule allowing successor employers to set initial employment terms.[9]

The Respondent, as the judge initially found,[10] lawfully established its pay system for new hires as part and parcel of its initial terms and conditions of employment under the *Burns* doctrine. The pay system, as described above, set a pay band for each job classification. Under the pay system, the Respondent was to determine a starting wage rate within the appropriate pay band to offer each new job applicant whom the Respondent wished to hire. The Respondent's setting of a starting wage in this

[5] Id. at 287–288.

[6] Id. at 294.

[7] Ibid. An exception to this rule, not applicable here, occurs in "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Id. at 294–295. See *Spruce Up Corp*., 209 NLRB 194 (1974), enfd. 529 F.2d 516 (4th Cir. 1975).

[8] The General Counsel did not contend at hearing or in his brief to the judge that the Respondent was required to bargain merely because it established a dual compensation system. Indeed, in his brief to the judge, the General Counsel expressly stated: "If prior to August 24, [1997] Respondent had established a pay system for new hires that set forth a specific wage rate for persons hired into each bargaining unit position, then Respondent would *not* be obligated to bargain with the Union over the pay rate of each new hire." (Emphasis added.)

[9] Indeed, there is nothing particularly unusual about dual, or two-tiered, compensation systems. Collective-bargaining agreements sometimes incorporate such systems of compensation. See, e.g., *Arrow Uniform Rental*, 300 NLRB 246, 247 (1990) (older two-tiered wage structure "grandfathered" by more recent contracts); *Johnson-Bateman Co*., 295 NLRB 180, 192 (1989) (agreement set forth two-tiered wage structure with different hourly rates depending on whether employee was hired before or after Aug. 1, 1986).

[10] See sec. II,A,2 of the judge's decision.

manner was an integral part of the pay system. Thus, to find, as the judge did, that the Respondent, as a lawful *Burns* successor, could establish the pay system for new hires as part of its initial terms of employment but could not offer a starting wage to any job applicant under that system without bargaining with the Union, deprived the Respondent of the rights to which it was entitled under *Burns*.

The Respondent's discretion under its pay system for new hires was tightly circumscribed. It permitted the Respondent to set pay rates only within predetermined pay bands. Additionally, the pay system applied only to new outside hires, not to Scripps employees whom the Respondent retained. Finally, the pay system concerned only the initial pay rates of the new hires. Once the new hires became part of the Respondent's work force, any subsequent raises or changes in their compensation would be matters on which the Respondent would be required to bargain with the Union. Moreover, wage rates established in any collective-bargaining agreement negotiated between the Respondent and the Union would presumably apply to all employees, including new outside hires.

Unlike the judge, we do not find the merit pay cases cited by the General Counsel analogous to the circumstances here. In *NLRB v. Katz*, 369 U.S. 736 (1962), the employer implemented merit increases while contract negotiations were ongoing. In *Oneita Knitting Mills*, 205 NLRB 500 (1973), a newly organized employer granted discretionary merit increases assertedly consistent with its past practice. And, in *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991), the employer implemented a merit pay program giving it "virtually unlimited discretion in determining the timing and amounts of merit increases." 295 NLRB at 609. In each instance, the Board found the employer's implementation of merit pay to violate Section 8(a)(5) of the Act.

The present case concerns a successor employer's setting of its initial terms of employment under which it agrees to take over operation of the enterprise from the predecessor. As provided in *Burns*, a successor employer has a right to establish unilaterally its own initial terms of employment. Thus, the setting of initial employment terms by a lawful *Burns* successor stands on different footing than decisions made by an incumbent employer.[11]

Accordingly, we find that the Respondent did not violate Section 8(a)(5) and (1) of the Act by failing to notify the Union and provide it with an opportunity to bargain concerning the rates of pay to be offered applicants for employment. Therefore, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting.

Contrary to my colleagues, I would find, in agreement with the judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify the Union and provide it with an opportunity to bargain about the rates of pay to be offered new applicants for employment.

The facts are undisputed. The Respondent acquired Monterey Newspapers, Inc. (MNI) from E. W. Scripps on August 24, 1997. On August 28, 1997, the Respondent recognized the Union as the exclusive bargaining representative of the unit employees. The judge found that the Respondent is a successor employer obligated to recognize and bargain with the Union.

Before it acquired MNI, the Respondent established, as part of its initial terms and conditions of employment, a separate pay system applicable only to employees hired after the acquisition of MNI. Under the new pay system, the Respondent established a pay band for each job classification and, within those pay bands, the Respondent unilaterally determined the wage rate to be offered each job applicant based on the applicant's qualifications and the local market conditions. The Respondent did not provide the Union with prior notice and an opportunity to bargain concerning the pay rates to be offered each applicant.

The judge found that the Respondent lawfully established its pay system for new hires as part of its initial terms and conditions of employment under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). He also found, however, that the Respondent nevertheless vio-

[11] Our dissenting colleague disagrees with us and finds appropriate the General Counsel's analogy between this case and cases in which incumbent employers must bargain over merit pay increases to employees. In our view, however, there is a substantial difference between a lawful successor employer's determining, within finite pay bands, initial wage rates to offer applicants and an incumbent employer's setting wholly discretionary merit increases for current employees. Finding these two disparate situations analogous ignores the unique status of successors under *Burns* and runs contrary to the Supreme Court's intent in *Burns*, quoted above, to permit successor employers to make changes that they may deem necessary to revitalize a predecessor's business. In sum, where a union becomes the representative of a unit of employees, the employer must bargain about all terms and conditions of employment. However, in a successorship situation (where the union continues to be the representative), the Supreme Court expressly gave the new employer a unilateral right to set initial terms and conditions, even if they differed from those prevailing under the predecessor. There is nothing in *Burns* to suggest that such initial terms cannot include flexibility, i.e., discretion within bounds. That is what occurred here.

lated Section 8(a)(5) and (1) of the Act by failing to provide the Union with the opportunity to bargain concerning each rate of pay it proposed to offer each applicant. I agree with the judge on both points.

Initially, I find that the wage rates offered by the Respondent to job applicants are mandatory subjects of bargaining because they concern the wages that newly hired unit employees are to be paid. My colleagues agree.

In finding no obligation to bargain about the initial pay rates, however, my colleagues reason that even though the applicants' initial pay rates are mandatory subjects of bargaining, the Respondent may unilaterally set those rates because, under *Burns*, a successor employer is ordinarily free to set initial terms even on mandatory bargaining subjects. My colleagues conclude that not to allow the Respondent unilaterally to set the rates under the pay band system would deprive the Respondent of its *Burns* right to set initial terms. I disagree.

The judge correctly found that because the pay band system provided for considerable discretion in determining the amounts to be paid each applicant, the Respondent must offer to bargain with the Union over those amounts. The judge analogized the discretion exercised by the Respondent under its pay band system to the discretion that employers exercise in determining merit pay increases under an existing merit pay system after a union becomes the bargaining representative of a group of employees. In such cases,[1] the Board has found that an employer is entitled to continue its merit pay system, but it must give the union notice and an opportunity to bargain over the discretionary aspects of the system, i.e., the timing and amounts of each merit pay increase.

My colleagues disagree with this analogy, finding that "the setting of initial terms by a lawful *Burns* successor stands on different footing than decisions made by an incumbent employer." I find the analogy apt. Just as the incumbent employer may continue its merit pay system, the successor may establish the pay band system as an initial term. In both cases, however, they must bargain over the amounts actually to be paid. As the General Counsel argues in his answering brief, in "both the merit pay and pay for new hires situations, the employer has a pre-existing term and condition of employment which it wants to continue after its obligation to bargain with the union arises; and in both situations the employer exercises considerable discretion in determining the amount to be paid each employee. Since the Board has determined that the employer's obligation to bargain extends to the discretionary aspect of the merit pay determinations, it follows that Respondent's obligation to bargain with the Union extends to the substantial discretion it exercises in determining the wage rate of each new bargaining unit employee." I agree with the General Counsel.[2]

For these reasons, I find, in agreement with the judge, that the Respondent violated Section 8(a)(5) and (1) by failing to notify the Union and provide it with an opportunity to bargain concerning the rates of pay to be offered to new job applicants.

*Gary M. Connaughton, Atty.,* for the Acting General Counsel.

*Derek Woodhouse* and *Daniel J. Muller, Attys. (Littler, Mendelson),* of San Jose, California, for the Respondent.

*Eugene Miller, Atty.,* of Seaside, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case at Monterey, California, on August 12, 1998. The San Jose Newspaper Guild Local 98, chartered by The Newspaper Guild, AFL–CIO, CLC (Union or Guild) filed the underlying charge on September 3, 1997,1 against Monterey Newspapers, Inc., a wholly owned subsidiary of Knight-Ridder, Inc. (Respondent or MNI and Knight-Ridder). The Regional Director for NLRB Region 32 issued the complaint and notice of hearing on January 30, 1998. The complaint alleges, in essence, that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act) by implementing new wage rates for newly hired employees and by discontinuing the payment of overtime to its district managers and single copy manager without providing the Guild with prior notice and an opportunity to bargain concerning these matters. Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged and interposing certain affirmative defenses.

The case presents the following two issues for resolution: (1) Does Respondent have a duty to notify the Guild and provide it with an opportunity to bargain about the specific pay rate it proposes to offer to applicants for employment in unit positions; and (2) Did Respondent have a duty to bargain with the Guild before designating its district manager and single copy manager jobs as an exempt positions under the Fair Labor Standards Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting The General Counsel (General Counsel), the Guild, and the Respondent, I have concluded that Respondent violated the Act as to the matter of pay rates for applicants but that it did not violate the Act as to other issue based on the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that it is a Colorado corporation with an office and place of business in Monterey, California, where it is engaged in the publication of a newspaper of general circulation. Respondent further admits that since August 24, 1997, when it commenced operations, it has received gross revenues in excess of $200,000 and that its direct inflow exceeded $5000.

[1] Although my colleagues characterize the Respondent's discretion under its pay band system as "tightly circumscribed" because the Respondent was permitted to set pay rates only within predetermined pay bands, I find that even this type of limited discretion is sufficient to trigger the Respondent's obligation to notify and bargain with the Union over the exercise of that discretion.

[2] Although my colleagues characterize the Respondent's discretion under its pay band system as "tightly circumscribed" because the Respondent was permitted to set pay rates only within predetermined pay bands, I find that even this type of limited discretion is sufficient to trigger the Respondent's obligation to notify and bargain with the Union over the exercise of that discretion.

[1] All dates refer to the 1997 calendar year unless otherwise indicated.

During the same period, Respondent subscribed to interstate news services, published nationally syndicated features, and advertised nationally sold products. Therefore, I find that Respondent meets the Board's jurisdictional standards and that it would effectuate the purposes of the Act for the Board to exercise its statutory jurisdiction to resolve this labor dispute. Respondent also admits, and I find, that the Guild is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

*A. Relevant Facts*

1. Background

MNI publishes the *Monterey County Herald* (*Herald*), a general circulation daily newspaper serving Monterey County, California, and the surrounding area. Since approximately the mid-1970s, the Guild has represented MNI's employees and negotiated a series of successive collective-bargaining agreements, the most recent being effective by its terms from January 1, 1996, through June 30, 1999. On August 24, Knight-Ridder acquired MNI from E. W. Scripps (Scripps), hired a vast majority of the unit employees, and continued publishing the *Herald* without interruption. Although Knight-Ridder declined to adopt the Guild's collective-bargaining agreement, it employed the unit employees at the same rate of pay they earned under the Scripps ownership, in effect, the rates of pay specified in the Scripps-Guild contract.

By a letter dated August 28, Respondent's counsel informed the Guild that Respondent acknowledged "that you represent a majority of the employees in an appropriate unit." The letter goes on to recognize the Guild as the exclusive bargaining representative "in an appropriate bargaining unit." On it's face, the unit described in the August 28 recognition letter varies somewhat from the historical unit as described in the most recent collective agreement. However, by the time of the hearing, the parties had engaged in negotiations for approximately 11 months but had not yet reached agreement on the terms of a new collective-bargaining agreement.

In his complaint, the General Counsel alleged and the answer admits that Respondent purchased the MNI's assets from Scripps and thereafter continued to operate MNI from the same location, providing essentially the same service to the same customers, and has as a majority of its employees, individuals who were previously employees of Scripps. Despite that admission, Respondent's answer denies that it has continued the employing entity and is a successor of Scripps. In addition, the General Counsel alleged the historical contractual unit as the current appropriate unit. At the hearing, The General Counsel introduced the most recent collective-bargaining agreement. On the basis of the unit described therein, I find that the unit alleged in the complaint accurately describes the historical unit. Nevertheless, Respondent's answer denied that the historical unit was appropriate even though it admits that Scripps had recognized the Guild as the exclusive representative for that unit.

In his brief, the General Counsel argues that in successorship situations such as this, the historical unit is the appropriate unit unless Respondent proved the that unit was repugnant to the Act. Respondent made no attempt to do so here. Moreover, Respondent's most fundamental argument in this case is that on the basis of the *Burns* successorship doctrine,2 it had the right to establish the initial terms and conditions of employment. In addition, no evidence was adduced that the Guild demonstrated either through a recent election or a showing of current authorization cards that it represented a majority of the employees in the more limited unit described in the August 28 recognition letter. Absent some legal obligation, even that limited recognition of the Guild would be unlawful. Based on Respondent's admission that it purchased the MNI's assets, continued its operation serving the same customers with essentially the same service from the same location employing a majority of the employees formerly employed by Scripps, I find Respondent to be a successor employer obliged to recognize the Guild as the exclusive representative in the historical unit. Furthermore, based on its arguments in this case, I find that Respondent has implicitly admitted that it is a successor employer. In the absence of evidence that the historical unit is repugnant to the Act, I find it to be the appropriate unit. *Trident Seafoods, Inc*., 318 NLRB 738 (1995).

Before this acquisition, the Knight-Ridder organization sent several managers and specialists to Monterey, in effect, to survey MNI's method of operation under Scripps ownership, to make operational changes compatible with operations in the Knight-Ridder organization, and to interview job applicants to staff MNI following its acquisition. Two compensation changes applicable to unit employees are pertinent to this case. The first concerns the compensation system Knight-Ridder established at MNI for new employees hired after its initial staffing from the ranks of its predecessor. The second concerns the timing of a change made in the job descriptions of its district managers and its single copy sales manager that precluded their eligibility for overtime pay that they received under the Scripps ownership.

2. The new hire issue

As noted, Knight-Ridder hired a large majority of the former Scripps employees at the same pay rate they previously earned. Therefore, the pay rates for the former Scripps employees are rooted in the last Guild collective-bargaining agreement with MNI under Scripps ownership. It is undisputed that Knight-Ridder established a separate pay system in the pre-acquisition period applicable to new employees hired after it acquired MNI. Although neither the General Counsel nor the Guild would concede as much at the hearing, I am satisfied that the evidence shows conclusively that Knight-Ridder established this separate pay system for new hires at MNI as a part and parcel of its initial terms and conditions of employment permitted under the *Burns* doctrine.

Under the compensation system for new hires, a pre-determined high, midpoint and low pay range or pay band has been established for each MNI job classification. In the following testimony, Jan Pallares, MNI's business manager, succinctly explained the operation of the system and MNI's hiring procedures:

> Q. [By Mr. Connaughton]: [Have you] been involved in the determination of the amounts that are offered to new bargaining unit employees?
>
> A. Yes.
>
> Q. And what role do you play?
>
> A. Well, I have to approve all new hires, so my signature or that of the [local] publisher is necessary before a hire offer is made.
>
> Q. Do you actually—do you only look at it after an amount has been suggested, or do you get involved in the actual discussion?
>
> A. No. The way it works is the department manager who is requesting a position submits a form, a request for a position. A person is requesting a reporter, for example. We take the reporter position that they're requesting. We go ahead and look on the salary band grid that we have. We find that position, and we go ahead and put in there the salary band, minimum to maximum. Then at that point we go ahead and we give the approval to start interviewing, place an ad in the paper, conduct interviews, try to solicit candidates for the position. Once the hiring manager and the HR director agree on a candidate, we review their qualifications. Then the HR director and me sometimes says, "You have approval to—hire within the bands, this particular range, from the minimum to the midpoint or the midpoint [to the maximum]." And then the offer is made to the candidate.
>
> Q. How do you determine if someone is offered between the minimum and the midpoint; how do you determine that as opposed to the midpoint to the maximum?
>
> A. Well, there's a lot of different factors involved, and the factors depend on the individual candidate that we have in mind, their preparation, their skills, the difficulty that we have had in obtaining similar candidates in the

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2 *NLRB v. Burns Security Services*, 406 NLRB 272 (1972).

past for those positions. It involves local market conditions for individuals. There's a whole slew of different factors involved.

Q. Okay. And—but they're always hired within that narrow range within the bands, always hired—at least since you've been there, they've always been hired within the bands?

A. That's right.

Q. And—now is it always decided that—I'm not sure if I understood some of your testimony, that you would authorize only to be hired between the minimum and the midpoint?

A. No, that was an example.

Q. Okay.

A. Within a band. Let's assume that the band is from 25 to 35,000, minimum being 25 the maximum being 35. We might say, "Go ahead and make an offer. You cannot"—"you must offer the minimum, but you cannot exceed the midpoint." Let's assume the midpoint is 30, or we could say, "You're range is 28,000 to 32,000." Again, within the band, a different range that we decide on.

Q. If somebody—has it happened that somebody has turned down an initial offer that was made?

A. Of course, yes.

Q. And what do you do then?

A. Well, let's assume that the candidate in this hypothetical situation, assuming we offer 30, that being the midpoint, the maximum being 35, the candidate comes back with a counteroffer. He says, "I want 33." As long as it's within the range, we discuss it, and we could discuss to make a—counter all the 33 or whatever counter we decide.

Pallares further explained that if the applicant insists on a pay rate above the maximum amount, that applicant will not be hired. Since August 24, MNI has hired 49 new employees using this system albeit some have already terminated their employment. In preparation for this hearing, Pallares, the business manager since March 1998, discovered that five employees have been hired at pay rates other than provided for under this system in the period between August 24 and the start of his tenure. No determination had been made about what corrective action, if any, would be taken. Respondent concedes that it does not provide the Guild with prior notice and an opportunity bargain concerning the pay rates to be offered applicants. As discussed below, it argues that it has no legal obligation to do so.

3. The overtime issue

The timing of the second change at issue is pertinent to the outcome and the facts pertaining to that change are disputed. This change involved reclassifying two positions, district manager and single copy sales manager, from nonexempt to exempt employees for purposes of the Fair Labor Standards Act.[3] As exempt employees, the incumbents of those positions would not be eligible for overtime pay. Under the Scripps' ownership, MNI's district managers and the single copy manager were nonexempt employees paid on a biweekly basis who, under the terms of the Guild agreement, received overtime pay for all work beyond 7.5 hours per day or 37.5 hours per week.[4] Every 2 weeks, MNI's accounting department distributed biweekly timesheets to the various departments where they, in turn, were provided to the nonexempt employees for the purpose of recording their hours of work. At the end of the 2-week period, the employees submitted their timesheets. Thereafter, the timesheets were reviewed and signed by a department supervisor and submitted to the payroll department for processing.

An employee handbook distributed to employees at the time that they accepted employment with Knight-Ridder imposed a requirement for all nonexempt employees to accurately record their time. The handbook further provides that nonexempt employees would only receive overtime if they worked more than 40 hours per week or 8 hours per day as provided by law.[5]

Arden Dickey, at the time a Knight-Ridder's corporate vice president for circulation, Eva Perez, a Knight-Ridder Miami-based human relations consultant, and Mark Olson, at the time MNI's circulation director, all agree that a decision was made during the preacquisition period to change the status of the district managers and the single copy sales manager from nonexempt to exempt. According to Olson, MNI's human relations director, redrafted the job descriptions for these two positions to reflect this change. Both Dickey and Olson reviewed and edited the changed job descriptions through this period. Dickey and Perez testified that the revised job description had been completed before they interviewed applicants for those two positions during the week of August 12 but Olson's recollection indicated that the job descriptions may not have actually been completed until about a week before Knight-Ridder took over. Regardless of when the job description revision was actually completed, all who directly participated agree that the decision was made to for this change in status prior to the time the applicants were interviewed.

Laurie Fox, a director of administration in human relations at another Knight-Ridder property in California, was sent to Monterey in August to coordinate the interviewing and hiring of employees at MNI. Fox testified that she worked as a part of the team which developed the new compensation scheme at MNI that, in essence, was imported from Knight-Ridder's property in Myrtle Beach, South Carolina, with an adjustment factor to account for California conditions. For her work as a coordinator, Fox was provided with a classification by classification listing of jobs segregated on the basis of their exempt and nonexempt status. The lists provided to Fox reflected the district manager and the single copy sales manager positions as exempt.

Dickey and Perez interviewed the applicants for the district manager and single copy sales manager jobs at MNI. Both agree that the applicants, or at least the Scripps employees who, in effect, applied for their own jobs with the Knight-Ridder organization, were all told during the interviews that the job would be an exempt position. Dickey claimed that he followed a prepared format for all of the interviews. He further claimed that he asked all of the applicants for the district manager positions whether "they aware that the position was being changed from nonexempt to exempt" and whether they would have a problem with that change. Dickey gained the impression that nearly all were unaware of this change but he also gained the sense from their responses that it would not make much difference to them. If the interviewee indicated in any way that he did not understand the significance of the change, Perez explained that the principal significance would be that they would not be eligible for overtime pay. However, neither Dickey nor Perez recalled a discussion of this matter with Malcom Beety, the applicant for the single copy sales manager position.

Michael Johnson, a long time MNI district manager, and Malcom Beety, MNI's long time single copy sales manager, both applied for their same jobs with Knight-Ridder. They provided a different account of Dickey's interviews. On direct examination, Johnson testified that nothing at all was said in the interview about changing the status from nonexempt to exempt or about overtime. Later, during his cross-examination, he recalled that the subject of the exempt status of the position did come up in the interview. During his redirect examination, Johnson claims that Dickey ask him what his "feelings" would be if the job was exempt. Johnson told Dickey that it "wouldn't change anything." Johnson claimed that he worked a lot of overtime

[3] District managers oversee the work of the newspaper carriers who deliver the newspaper to its subscribers' homes. The single copy manager supervises the independent contractors who distribute the newspaper to news racks and the news dealers. They are supervised by the circulation department manager and have been unit employees historically.

[4] Under the agreement, other employees worked an established 35-hour workweek. Knight-Ridder did not change the basic workweek schedule, at least for nonexempt employees.

[5] At the time, California law provided for overtime pay after 8 hours work per day. That has since changed.

with Scripps but that he sought pay for very little of it. Beety recalled that he was told in the interview that the job "may or may not be an exempt position" and that he was asked if it would make any difference to him. Beety told the interviewers that it would not.

About a week after the interviews, Knight-Ridder extended written job offers to all of the Scripps district managers and to Beety, the single copy manager. Although the job offers specified their existing rate of pay, it was silent as to their status for overtime pay purposes. No evidence shows that anything further was mentioned to these employees about their status apart from what had been said in the Dickey interviews but there is evidence that there was considerable discussion among the employees about their overtime status in the preacquisition period.

Knight-Ridder's acquisition became effective on Sunday, August 24, precisely in the middle of the usual biweekly pay period. For that pay period, employees, including the district managers and the single copy manager, completed two separate timesheets, one for a week's pay from Scripps and the other for a week's pay from Knight-Ridder. It appears that the circulation department employees at issue were provided with the usual timesheets and that they completed them in the usual fashion. For Wednesday, August 27, Beety recorded 9-1/2 hours of work and claimed 1-1/2 hours of overtime for that day. The timesheets appear to have been approved by Operations Manager Roy Ulrich rather than Olson who usually performs this task if he is available. Beety subsequently received the claimed overtime premium.

Timesheets for the disputed circulation department employees were again distributed in the usual fashion for the following pay period. In this pay period, district managers Johnson and Priest each claimed one hour overtime pay in the second week of the pay period. Ulrich again signed the timesheets and these two employees subsequently received the overtime pay. However, Olson recalled that Ulrich approved the timesheets for that pay period because he had taken time off from work. When he returned the following week, Olson claims that Ulrich reported that he had raised the question of the district manager's exempt status with an employee in the payroll department and had been told that they were nonexempt employees.

This report prompted Olson, who claimed generally that there was considerable turmoil in the transition period, to speak with at least some of disputed employees. As a result, Olson learned that some believed that they were now exempt employees but others did not. District Manager Johnson recalled a meeting in this period in which Olson explained that they would no longer get overtime because he understood that they were now "managers." On this occasion, Johnson argued that "[n]one of us were told we were managers." Johnson claims that Olson responded that he check on the situation with Tom Hooten in human resources.

According to Olson, Hooten agreed that the disputed employees were now exempt and he agreed to straighten the matter out. However, because the payroll was already in progress, Hooten and Olson agreed that the claimed overtime would be paid but that Olson would notify all of the disputed employees that they were now exempt employees. As a consequence, Olson issued a memo to Beety and the district managers dated September 26. That memo states:

> During the hiring of the district managers and the single copy manager by the Knight-Ridder team . . . the position descriptions for those jobs were reviewed by corporate human resources personnel and by corporate counsel to determine if they met the Fair Labor Standards Act criteria as exempt positions, i.e., positions that due to the nature of the work performed, are salaried positions that are exempt from over time provisions. They all agreed that they are exempt positions. Tom Hooten and I recently learned that not all employees in those positions understood their exempt status, so we felt we should issue this letter to make sure there were no misunderstandings.
>
> As exempt managers, you are salaried, and you will not fill out time cards. Your hours of work will be arranged by Linda [Franks, the newly hired home delivery manager] and myself.
>
> If you have any questions related to your status, please talk to me or Tom Hooten.

Since that time, the disputed employees have not received pay for any overtime worked and presumably have not completed timesheets as in the past. The Guild was not given prior notice of Olson's memo.

*B. Further Findings and Conclusions*

1. The new hire issue

The General Counsel contends that the minimum-maximum pay bands established by Respondent for use in hiring new employees leaves the local managers considerable discretion in setting rates of pay for use in hiring. The General Counsel further argues that this discretion is analogous to the discretion employers exercise in fixing merit pay increases. That being the case, the General Counsel argues that Respondent had a duty to provide the Guild with prior notice and an opportunity to bargain concerning the specific pay rates management offered to applicants for employment. For support, the General Counsel relies on the line of merit pay cases including *NLRB v. Katz*, 369 U.S. 736 (1962); *Oneida Knitting Mills*, 205 NLRB 500 (1973); and *Colorado-Ute Electric Assn.,* 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991). Recognizing that Respondent and the Guild are currently engaged in negotiations for a new collective-bargaining agreement, the General Counsel proposes a novel bargaining scheme that would permit Respondent to implement a pay offer to an applicant without the Guild's agreement even in the absence of an overall impasse in the extended, ongoing negotiations. The Guild adopts the argument advanced by the General Counsel but differs with the General Counsel over the appropriate remedy for this alleged violation.

Respondent argues that at the time it makes wage offers to applicants, they have not yet become bargaining unit employees and have no employment relationship with MNI. Accordingly, it asserts that it has no duty to bargain with the Guild concerning wage offer it plans to extend to the applicant. In support, Respondent relies on the Board's preliminary conclusion in *Star Tribune*, 295 NLRB 543, 545 (1989), that applicants for employment are not "employees" for purposes of the Act's bargaining obligations. In its brief, Respondent recognized that "once Respondent and the Guild reach an agreement on a first contract, MNI will be obligated to pay its new hires the negotiated contract wages." Based on that statement, Respondent presumably also recognizes that at the moment the applicant for employment is transformed into a bargaining unit employee, his or her rate of pay is thrown into the milieu of mandatory bargaining subjects, contract or no contract.

Respondent does not contend that the fixing of the rates of pay offered to applicants does not involve the exercise of managerial discretion and I agree with the General Counsel's argument that the discretion exercised by Respondent's local managers in determining applicant pay rate offers is analogous to decisions frequently made in merit pay situations. But I also agree with Respondent's contention that an employer generally has no duty to bargain as to applicants for employment. In the *Star Tribune* case the Board held as follows:

> Consistent with [the Supreme Court's] analysis in [*Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)] we conclude that applicants for employment are not "employees" within the meaning of the collective bargaining obligations of the Act.[10] Applicants for employment do not fall within the ordinary meaning of an employer's "employees." Applicants perform no services for the employer, are paid no wages, and are under no restrictions as to other employment or activities. And, unlike the intermittent employment situation that gives rise to the need of employers and unions for hiring halls, there is no economic relationship between the employer and an applicant, and the possibility that such a relationship may arise is speculative.
>
> We further conclude that the applicants could not properly be joined with active employees in the Guild unit because they do not share a community of interest broad enough to justify their inclusion in the bargaining unit.[11] Like retirees, applicants are not permitted by the Board to

vote in elections or considered to be part of a bargaining unit for representation elections.[12]

[10] Our conclusion that applicants are not employees for purposes of Sec. 8(a)(5) does not affect the established body of law that holds that the antidiscrimination provisions of Sec. 8(a)(3) of the Act forbid discrimination against applicants for employment. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

[11] Fn. text omitted.

[12] Fn. text omitted.

Although the decisions in both *Pittsburgh Plate Glass* and *Star Tribune* excluded entire classes of individuals no longer or not yet in the bargaining unit from the Act's bargaining obligations, each of the underlying decisions in those cases concluded alternatively that a duty to bargain existed because the subject matter at issue vitally affected current unit employees. Under that alternative theory, those decisions held an employer must bargain with the employee representative about subjects relating primarily to persons outside the bargaining unit if those subjects "materially or significantly affect unit employees' terms and conditions of employment." But an employer need not bargain concerning those subjects if they have only an "indirect or incidental impact on unit employees." *United Technologies Corp*., 274 NLRB 1069 (1985), enfd. 789 F.2d 121 (2d Cir. 1986). Implicitly, this standard requires a case-by-case analysis. In *Pittsburgh Plate Glass*, the Supreme Court held, contrary to the Board, that the employer's unilateral changes in its retirees' medical benefits following the enactment of Medicare did not vitally affect the unit employees. And in *Star Tribune*, the Board held, contrary to the administrative law judge, that the employer's pre-employment alcohol and drug testing program did not vitally affect the unit employees.

In this case the General Counsel argues that the "wage rates offered to applicants, which become the "wage rates paid to new hires . . . vitally affect the terms and conditions of bargaining unit employees." In his brief, The General Counsel's brief asserts:

> [I]f employers were entitled to set the wage rates of new hires based on Respondent's theory, then contractual wage rates would be totally undermined. Regardless of what a collective bargaining agreement might set as wage rates, an employer would be able to set up a totally different pay scale for new hires and by "churning" the workforce essentially replace the contractual rates with different and inevitably lower rates. Consequently, the wage rates offered to prospective employees and paid to new hires are both vitally important to bargaining unit employees and vitally affect their terms and conditions of employment. Thus, in light of the standard set forth in the Supreme Court's decision in *Pittsburgh Plate Glass*, Respondent's defense is totally without merit.

Respondent relied solely on the *Star Tribune* holding that applicants are not employees under Section 8(a)(5) and did not address the theory that the pay rates offered to applicants vitally affects the terms and conditions of employment of the current unit employees.

I find the General Counsel's argument unpersuasive. His argument fails to recognize that the parties' protracted negotiations have, as yet, produced no collective-bargaining agreement. But assuming the parties eventually conclude a collective-bargaining agreement fixing a minimum pay rate for each classification as is typically the case, Respondent will not be at liberty legally to engage in the destructive "churning" practice the General Counsel predicts. Thus, if Respondent foolishly negotiates a pay rate with an applicant that is below the minimum contractual rate, Respondent still would be legally obliged to pay the minimum contractual rate from the time that person begins to perform unit work. This obligation is fully enforceable either through the grievance-arbitration system if one exists, a Section 301 action, or in an unfair labor practice proceeding if Respondent's conduct amounts to repudiation.

Nevertheless, I find that Knight-Ridder effectively created a dual compensation system at MNI when it acquired that property, one for the former Scripps employees and one for new hires. In my judgment, all aspects of the dual compensation system Respondent created when it acquired the MNI directly and vitally affects the current unit employees. At the outset, it must be recognized that the specific pay offer made to an applicant is virtually the final step in the hiring process. Put another way, it occurs immediately prior to the applicant's transition in status to a unit employee. It may be reasonably assumed that the vast majority of the applicants who progress to this point in the hiring process have an extremely high probability of becoming employed.

As the established pay bands already effectively fix a floor and a ceiling for starting wages rates, Respondent unquestionably would be required to bargain with the Guild before altering the current pay band ranges. Therefore, it is evident that the actual pay rate within the pay bands selected by individual managers in hiring employees is intimately connected to and derived from an already mandatory subject of bargaining. Moreover, each new employee hired at a rate different than the rate applicable to comparable employees hired from the predecessor's work force places an added burden on the already extended negotiations in order to eventually reconcile any resulting disparities. The probability that Respondent's dual compensation system will create considerable employee unrest is, in my opinion, extremely high as such systems are notorious for inciting disharmony. Accordingly, the Guild would have a considerable interest in the rates of pay offered applicants as the hiring of employees at disparate pay rates will likely prolong the parties efforts to conclude a collective-bargaining agreement.

For the foregoing reasons, I conclude that Respondent is obliged to provide the Guild with prior notice and an opportunity to bargain concerning the rate of pay it proposes to offer each applicant. By failing to do so, Respondent has violated Section 8(a)(5) and (1) of the Act.

2. The overtime issue

The General Counsel claims that, at least as to the three circulation department managers who claimed and received overtime pay in the first two pay periods following after Knight-Ridder acquired MNI, Olson's September 26 memo unlawfully alters their existing terms and conditions of employment. He argues at some length that I should not credit the claims by Dickey, Perez, and Olson that Knight-Ridder changed the district manager and single copy sales manager jobs from hourly nonexempt positions to salaried exempt positions as a part of its initial terms and conditions of employment. In effect, the General Counsel asserts that although Respondent may have contemplated such a change during the preacquisition period, it never actually implemented this change until almost a month following Knight-Ridder's acquisition when Olson issued his clarification memo. The General Counsel believes, therefore, that this belated implementation came too late to be considered as a part of the initial terms and conditions and that it had a duty to bargain with the Guild concerning that change.

Respondent contends that Knight-Ridder actually adopted the change in status for these two positions in the pre-acquisition stage and that the failure to fully implement the change in the first two pay periods following its acquisition of MNI was simply a mistake corrected by its officials immediately upon learning of the error. For this reason, Respondent argues, in effect, that it had no duty to bargain with the Guild before Olson issued his September 26 clarification memo. Respondent further asserts that enough was said about this potential change in the interviewing process to meet *Spruce-Up* considerations.6

I reject the General Counsel's invitation to discredit virtually all of Respondent's witnesses on this question. Even if I assume that the testimony of Dickey and Perez exaggerates the strength of the statements they made in the interviews about the change at issue, the testimony by Johnson and Beety establishes, at the very least, that the subject matter was raised in the interviews, their position about the change was solicited, and they expressed a lack of concern about the change insofar as their continued employment was concerned. It is reasonable to assume that if the General Counsel had evidence that one or more in this group strongly protested the change, I would have heard that evidence. Accordingly, Dickey's testimony that, contrary to expectations, this group expressed virtually no concern with this change is corroborated by the employee witnesses. Put another way, if Respondent had not already actually made the decision to change the status of this group by the time of the interviews, which I doubt, the employees certainly gave Respondent the green light to make that change during the course of the interviews. Hence, Respondent's argument that the circumstances here do not implicate considerations addressed in *Spruce Up* is strongly supported.

Having concluded that, at the very least, the employees expressed little or no concern about this change after they were consulted about it in the interviews, the question remains as to whether Respondent actually adopted the change as a part of its initial terms and conditions of

[6] See *Spruce Up Corp.*, 209 NLRB 194 (1974).

employment. In this connection, I regard all of the ado at the hearing about when the revised job descriptions were completed as of little or no import as that action is little other than implementing detail for the decision itself. In concluding that this decision was made at the pre-acquisition stage, I credit in particular Olson's testimony. By the time Olson testified in this hearing, he had left Knight-Ridder's employ and had returned to work for Scripps in Ventura County, California. In these circumstances, I am at a loss to understand why Olson would chose to fabricate his testimony in this case; in fact, I do not believe that he did. Moreover, I am satisfied that Olson's conduct after discovering that this group continued to claim and receive overtime is consistent with the conclusion that such payments resulted from an organizational mistake. Johnson's own testimony about the meeting Olson held with the employees demonstrates that Olson recognized the overtime claims as inconsistent with the decision to change the status of this group that had been made earlier. In fact, Laurie Fox's credible testimony, which The General Counsel does not address, provides a strong indication that the decision to change the status of these managers probably occurred before the interviews.

Finally, it should be recognized that, in reality, the evidence here shows that only a single payment was made mistakenly. As Olson's testimony shows, Respondent's managers became aware of the overtime claims by Johnson and Priest in the second pay period after the acquisition and they made a conscious decision to permit those payments only because the process for payment had gone too far. At the same time, however, Olson promptly clarified and corrected the situation. In sum, the evidence shows, as Respondent argues, that the change was made as a part of establishing its initial terms and conditions, and the subsequent overtime payments resulted from nothing other than an organizational mistake.

For the foregoing reasons, I will recommend that the complaint allegation pertaining to the district managers and the single copy sales manager be dismissed.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Guild is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit under Section 9(a) of the Act:

> All full time and regular part-time employees employed by Respondent in its Advertising (including classified), Building Maintenance, Business Office, Circulation, and News Departments; excluding all employees in classifications listed in Article 1, Section 2 of the January 1, 1996 through June 30, 1999 collective bargaining agreement between Scripps and the Guild, guards, and supervisors as defined in the Act.

3. By failing to notify the Guild and provide it with an opportunity to bargain concerning the rates of pay to be offered applicants for employment, Respondent violated Section 8(a)(1) and (5) of the Act.

4. Respondent did not violate the Act in connection with designating its district managers and single copy sales manager positions as exempt employees under the Fair Labor Standards Act.

5. Respondent's unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As noted, the General Counsel and the Guild are not in agreement as to an appropriate remedy in this case. The General Counsel seeks an order requiring Respondent to bargain with the Guild over "the wage rates of new hires until a contract is reached or until an overall impasse is reached and Respondent has implemented its wage proposal all subject to what the General Counsel refers to as a "mini-impasse," i.e., an impasse over the pay rate to be offered an applicant The General Counsel further believes that Respondent should be required to bargain over the rates applicable to all post-August 24 new hires and, if the parties agree that a higher rate is appropriate, that rate should be made retroactive to the date of hire.

The Guild believes that the remedy proposed by the General Counsel "is incomplete." In order to restore the status quo, the Guild argues that as Respondent failed to bargain over the discretionary aspects of the pay offers to applicants, it should be required to now fix their pay rates at the levels set for employees hired from the Scripps workforce until a new rate is bargained and to pay the new hires for any loss of wages suffered due to the different rates of pay. In the Guild's view, the General Counsel's proposed remedy rewards Respondent for its wrongdoing.

I concur that Respondent must bargain about future pay offers. In my view, each of those pay offers would constitute a "discrete event" separate from the parties' overall negotiations so that the employer need not await an overall impasse in their negotiations if the parties are unable to conclude an understanding about the pay offer in a reasonable time under the circumstances. See *Brannan Sand & Gravel*, 314 NLRB (1994) 282; *Stone Container Corp*., 313 NLRB 336 (1993).

However, as I have concluded that Respondent's dual compensation system would likely prolong negotiations for a collective bargaining agreement, I believe that affirmative remedial action is required to minimize the effects of that system on current negotiations without further burdening those negotiations. With this objective in mind, my recommended order requires Respondent, upon the request of the Guild, to supplant the rate of pay for any specific unit employee hired since August 24, without providing the Guild notice and an opportunity to bargain over the rate of pay offered, with the rate that would have been applicable to that employee had he or she been hired from the existing Scripps workforce and to reimburse that employee for any resulting difference in pay as provided in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Nothing in my recommended Order should be construed as requiring the Respondent to so supplant any employee's existing pay rate without a request from the Guild to do so. See *Taft Broadcasting Co*., 264 NLRB 185 fn. 6 (1982). Although the parties are a liberty to engage in separate negotiations about those specific cases if they so chose, it is my view that it is unnecessary to require such separate negotiations apart from the parties' overall contract negotiations.

[Recommended Order omitted from publication.]